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IN THE

Supreme Court of the United States

October Term, 1949.

No. 225.

THE ANDREW JERGENS COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REHEARING.

HOMER D. CROTTY,
1000 Banks-Huntley Building, Los Angeles 14, Calif.,
Attorney for the Andrew Jergens Company, Petitioner.

GIBSON, DUNN & CRUTCHER,
J. STUART NEARY,
FRANK MERGENTHALER,
Of Counsel.

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Statement.

The Court of Appeals for the Ninth Circuit enforced an order of the National Labor Relations Board against the Petitioner which required the Petitioner to bargain with the named Union despite the fact that subsequent to the decision and order of the Board it was determined that the Union did not represent any employees of Petitioner. This fact was brought to the attention of the Court of Appeals and was in fact admitted by the Respondent, the National Labor Relations Board, and such admission is recited in the Court's opinion [R. 567]. It was also admitted that the Board had not given any consideration to this loss of majority, but had found upon evidence taken more than three years before that the Union did represent the employees of the Petitioner.

Thereafter, Petitioner filed in this court a Petition for Certiorari which was denied on October 10, 1949. Subsequent thereto Petitioner filed herein a Petition for Rehearing of said order and urged as a grounds the pendency of a similar case (*National Labor Relations Board v. Maurice Eanet*) in the Court of Appeals for the District of Columbia, which Court had previously issued a decision in conflict with that of the Court of Appeals of the Ninth Circuit in the instant case. That decision of the Court of Appeals of the District of Columbia had at that time been vacated and a rehearing granted, and this Court was urged to reconsider Petitioner's Petition for Certiorari and hold the matter under advisement pending a redetermination by the Court of Appeals for the District of Columbia. The copy of the vacated decision of the latter court was attached to the brief accompanying the Petition for Rehearing and marked Appendix A.

Since the filing of that Petition for Rehearing the Court of Appeals for the District of Columbia on October 31, 1949, again issued its decision in the case before it, reaffirming and reinstating its original decision. That court also issued a supplemental opinion which is attached to this brief as Appendix. It is the position of Petitioner herein that the decision of the Court of Appeals for the District of Columbia in that case is in direct conflict with the decision of the Court of Appeals of the Ninth Circuit in the instant case and, therefore, affords new grounds for the granting of a Petition for Certiorari.

A Writ of Certiorari Should Be Directed to the Court of Appeals for the Ninth Circuit Inasmuch as the Decision of That Court Is in Conflict With a Recent Decision of the Court of Appeals of the District of Columbia.

In the instant case the Board has consumed a period of three years from the time of the only hearing to the enforcement of its order. The Court of Appeals for the Ninth Circuit was urged by a proper Petition to adduce evidence and Answer that the order of the Board should not be enforced due to intervening and changed circumstances which consisted of the fact that the Union involved no longer represented any employees of the Petitioner. The decision of the Court of Appeals was that such matter was irrelevant and Petitioner would be required to bargain with such a non-representative Union despite its loss of majority representation, despite the further fact that the Board had not considered such loss of majority nor determined the causes of the loss of majority, and in the face of the fact that the Board had even expressly assumed in issuing its order that the Union represented a majority of Petitioner's employees.

In *National Labor Relations Board v. Maurice Eanet*, Court of Appeals for the District of Columbia, No. 9792, the court originally issued a decision which held that since two years had elapsed between the time of the hearing and the Petition for Enforcement it could no longer assume that the Union with which the employer involved therein was ordered to bargain represented the employees of the employer and, therefore, would not enforce the order until such a redetermination of representation was made. That decision was vacated, and a re-

hearing was granted and a supplemental decision was issued October 31, 1949, which reached the same result, and which is reproduced in Appendix of this brief. That supplemental opinion states:

> "The opinion, order and decree of this court of September 27, 1948, which were vacated March 1, 1949, for the purposes of the rehearing, are hereby reinstated and, as supplemented by this opinion, are made the opinion, order and decree of the court." (Appendix, p. 13.)

The supplemental decision together with the original decision which was reinstated makes it clear that the decision in that case is in conflict with the decision of the Court of Appeals in the instant case.

The decision in the instant case of the Court below stated:

> "It seems to us there is further support for the enforcement of the Board's order in the known and established policy of the National Labor Relations Board in dealing with like cases. In the Karp Metal case, 51 N.L.R.B. 621, the Board, in a similar situation, stated that it was its firm policy to assume that any losses of membership which are concurrent with or subsequent to unremedied unfair labor practices are results of such practices. In forming this policy the Board admits that some losses may be motivated by other factors, but considers it impossible to disentangle them so long as the refusal to bargain stands. See also, Pure Oil Co., 62 N.L.R.B. 1039, 1044, 1045. It would be useless to remand this case to the Board for findings on this matter, since the order in the instant case applies this policy to the facts as respondent has presented them to us."

This is to be contrasted with a similar position on the part of the Board in the *Maurice Eanet* case which the Court of Appeals for the District of Columbia found unacceptable. The decision in that case states:

> "We granted the motion, suggesting that a motion to remand for receipt of later and fresher evidence would be entertained. The Board rejected the suggestion, its counsel stating flatly in their brief on rehearing. '. . . the Board has authorized us respectfully to advise this Court that if a motion to remand the case to the Board were granted, the Board would feel compelled, upon the basis of its prior decisions, to reaffirm its order directing respondents to bargain.' And later in their brief they said: 'In the light of this well-settled doctrine, the Board has, as we have noted, authorized us to advise this Court that if the case were to be remanded to the Board, the Board would adhere to its previous order.' And again they said: 'Since the Board upon a remand of the case would adhere to its prior order, it follows that no good purpose would be served by remanding the case to the Board.' Thus, the Board declines our suggestion, and we are limited to the record as originally made, of events which occurred in the spring of 1946." (Appendix pp. 6-7.)

The Court of Appeals for the District of Columbia in refusing to accept such a stereotyped method as a substitute for evidence clarifies the scope of its original decision so as to make it clear that while it did not decide whether the Union did or did not still represent the employees involved it felt that due to the lapse of time it could not assume that any of the facts found by the Board still existed, among them the question of whether

the Union did in fact represent the employees. That court also made it clear that where that question is raised the order to bargain cannot be enforced until a redetermination of representation has been made by the Board. In its supplemental decision in the *Maurice Eanet* case that Court stated:

> "We held, and we hold, on the basis of the whole record before us, that an enforcement decree ought not to be entered in this case in the absence of any showing whatever, based on reasonably recent inquiry, that a decree of court is appropriate or necessary." (Appendix, p. 11.)
>
> "Substantial considerations support the view that the court should require some reasonably recent indication that a decree is warranted." (Appendix, p. 9.)
>
> "The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute." (Appendix, pp. 9-10.)
>
> "Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. In an ordinary law suit of the magnitude of the case at bar, we venture to say that no court would enter a mandatory or injunctive decree on data two years old." (Appendix, p. 10.)

The conflict of that case with the instant case is made especially clear by the dissenting opinion therein of Chief Judge Stephens wherein he cites the instant case (Appendix, p. 18) in support of his argument that the question of loss of representation occurring after the order of the Board is not material in a proceeding for enforcement. It should also be noted that he cites in the same reference cases relied upon by the Court of Appeals for the Ninth Circuit in the instant case as well as relying strongly upon the decision of this court in *Franks Bros. Co. v. National Labor Relations Board,* 321 U. S. 702, which also was relied upon by the Court of Appeals for the Ninth Circuit. The instant case and the cases relied upon by the instant case, are, therefore, urged by Chief Judge Stephens in his dissenting opinion in the *Maurice Eanet* case as being contrary to the decision of the count in that case on the question of the effect of lapse of time between the hearing before the board and the petition for enforcement, and the resulting effect upon the question of representation by the union. Surely then there is conflict and the grossest confusion over the question of the effect of intervening circumstances upon the enforcement of an order of the National Labor Relations Board.

Conclusion.

The decision of the Court of Appeals in the instant case is in direct conflict with the decisions of the several circuits as set out in the original Petition for Certiorari and accompanying brief. This conflict is broadened in the recent decision of the Court of Appeals for the District of Columbia and the conflict and confusion among the circuits arises from the varying constructions placed upon the decision of this court in *Franks Bros. Co. v. National Labor Relations Board,* 321 U. S. 702. It is, therefore, earnestly and respectfully submitted that the decree of the Court of Appeals for the Ninth Circuit enforcing the order of the National Labor Relations Board should be vacated and that a Writ of Certiorari should be directed to that court to review its decision.

Dated: November 1, 1949.

Respectfully submitted,

HOMER D. CROTTY,

Attorney for the Andrew Jergens Company, Petitioner.

GIBSON, DUNN & CRUTCHER,
J. STUART NEARY,
FRANK MERGENTHALER,
Of Counsel.

APPENDIX.

United States Court of Appeals, for the District of Columbia Circuit. No. 9792.

National Labor Relations Board, Petitioner v. Maurice Eanet and Ben Rich, as Individuals and Copartners doing business as Parkside Hotel and Parkside Hotel, Inc., a Corporation, respondents.

On Rehearing.

Rehearing March 28, 1949—Decided October 31, 1949 before Stephens, C. J., and Wilbur K. Miller and Prettyman, J. J.

PRETTYMAN, *J.*: The Board argues that our decision in this matter rested upon the possibility or probability that the Union had lost its majority of respondents' employees between the time of the dispute and the time of submission to the court. Our decision was not upon that basis. We did not know and did not assume or speculate that the Union had lost its majority. To correct the misapprehension, we state again our opinion and decision.

Before we do that, however, we note the rule which the Board itself says is applicable to the hotel industry. The latest announcement by the Board on this subject is *In the Matter of White Sulphur Springs Company,* Case No. 9-RC-392, decided September 19, 1949. The hotel there involved was a nationally known resort hotel owned and operated by the Chesapeake & Ohio Railroad, having, as is commonly known, a large number of employees and making

large purchases in interstate commerce. In that decision and order, the Board said:

"The Employer contends that it is not engaged in commerce within the meaning of the Act. Although the Employer's operations are not wholly unrelated to commerce, it appears that a cessation of this Employer's operations would have such a remote and indirect effect on commerce that to assert jurisdiction here would not effectuate the policies of the Act.

"To assert jurisdiction here would be to reverse Board precedent untouched since the original Wagner Act was enacted 14 years ago. We can find no adequate reason to depart from a practice adhered to administratively by our predecessors and ourselves since 1935. Nothing in the legislative history of the present Act indicates dissatisfaction by the Congress with the Board's long-standing policy. Indeed, the absence of mention of this industry in the hearings or debates leading to the 1947 amendments to the original Act indicates a disposition not to question or disturb the Board's policy."

The case at bar concerns a very small hotel located in the heart of downtown Washington, with ten employees. Nevertheless, the trial examiner concluded, and the Board approved the conclusion, that the activities of this hotel "have a close, intimate, and substantial relation to trade, traffic and commerce within the District of Columbia, and tend to lead to labor disputes burdening and obstructing such commerce and the free flow of commerce." We cannot refrain from viewing this conclusion, in respect to this small local hotel, in the light of the general policy which the Board says it has followed in respect to hotels since

1935 and has applied to so great an operation as that of the Greenbrier at White Sulphur Springs.[1] If the cessation of the operation of the Greenbrier Hotel would have a negligible effect on commerce, it is difficult to see how the cessation of operation of the Parkside Hotel would have a substantial effect on commerce.

The dispute in the case at bar arose in April, 1946, when two business agents of a labor union appeared before the manager of the Parkside Hotel and said that by designation of six bellboys and maids the Union was the bargaining representative of the ten employees in that category. The testimony as to these conversations is confused and conflicting. One of the agents testified that the manager started to make an antagonistic remark but then restrained himself and said that he had no objection to the employees' Union. This witness said, however, that the manager's wife, who was the switchboard operator, repeatedly interrupted the conversations and made declarations of hostility toward unions. The other agent attributed these declarations to the manager himself. Several similar conversations occurred. Important in the controversy at that point was the fact that two bellboys who belonged to the Union had been discharged. But it was later established, apparently to everyone's satisfaction, that one was fired for repeatedly being drunk on the job and the other for giving the room numbers of lady guests to guest

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[1]Examination of the published indexes and digests of National Labor Relations Board decisions fails to reveal any other decision upon the policy of the Board in respect to its jurisdiction in the hotel industry, except In the Matter of Willard, Inc., 2 N. L. R. B. 1094 (1937), in which the Board exercised its jurisdiction in a case involving the discharge of employees for union activities, and in which this court issued an enforcement decree (68 App. D. C. 372, 98 F. 2d 244 (1938).)

sailors, and so that phase of the original trouble disappeared from the case. In any event, the Union filed charges with the Board, and a field representative of the Board called upon the manager. He asked the manager to sign an "agreement for cross check." The manager signed it and gave the Board representative the current payroll as a list of the employees. At this point there is further confusion. The manager testified that he asked what a "cross check" was and was told that it was a recount or re-vote, and he understood that it meant that the employees were to vote again. The field examiner left the hotel and called on one of the owners. This owner testified that he told the examiner that the manager had no authority to sign the agreement but that the whole matter would be handled by counsel, whom he then called and who made an appointment with the examiner. This field examiner was not called as a witness at the subsequent hearing, and counsel did not testify.

Some time after the interviews above described, the manager received written instructions from the Board to post for five days a printed notice, enclosed, and a copy of the agreement for cross check, also enclosed. The agreement recited that after the five-day posting period, "if the Regional Director is of the opinion that no valid cause to the contrary has been shown," he would issue a "Report on Cross-Check" finding that the Union had been designated. The manager posted the notice and at the end of the five days wrote the field examiner of the Board:

"The attached notice has been posted for five days, and it appears that the employees are not interested.

"Awaiting your further word, I remain,

"Respectfully yours,

_____ _____."

It appears that during the five days a vote of the employees (the manner being a disputed point in the case) was taken and the ballots given to the manager. These ballots were the basis for the statement in his letter. Without inquiring further of the manager, the Regional Director issued a Report on Cross-Check, reciting that "no valid cause has been shown why this Cross-Check should not constitute complete and final disposition of the question concerning representation."

The taking of the vote during the five-day period is one of the two unfair labor practices found by the Board. The manager testified that he told the employees that he understood they were supposed to vote but that how they voted was none of his business. No one testified to the contrary.

After the Report on Cross-Check, the Board, on July 13, 1946, issued a complaint, and a hearing was had. The trial examiner made his report, exceptions were filed, and the Board reviewed the report, adopted the findings, with some exceptions, and issued its decision and order. It found the owners of the hotel guilty of unfair labor practices, in that (1) the housekeeper had told a bellboy that if the maids joined the Union she would fire them; (2) the manager took a poll of the employees, and (3) the owners refused to bargain with the Union. The Board ordered the owners to cease and desist from (a) warning their employees to refrain from membership in a labor organization (this in spite of the trial examiner's finding that there was no evidence that the employers had so warned the employees) and (b) in any manner interfering with the efforts of Hotel Service Workers, Local 80, A. F. of L., to negotiate for or represent the employees. It directed

the employers to post various notices, which notices said, among other things, that the owners would not in any manner interfere with the efforts of Local 80 to represent the employees. The Board ordered the employers to bargain collectively with Local 80 as the exclusive representative of the employees.

On March 10, 1948, the Board filed its petition with this court. The petition recited jurisdictional facts, the entry of the Board's order, and the order verbatim, and prayed for a decree of enforcement. The petition contained no allegation that respondents had ignored or refused to obey the order of the Board. The record contains no facts of occurrences since the spring of 1946, and the petition recited none.

This court in a short opinion reflected its view that in a minor case of this sort the Board should bring its information up to date. Instead, the Board moved for a rehearing. We granted the motion, suggesting that a motion to remand for receipt of later and fresher evidence would be entertained. The Board rejected the suggestion, its counsel stating flatly in their brief on rehearing, ". . . the Board has authorized us respectfully to advise this Court that if a motion to remand the case to the Board were granted, the Board would feel compelled, upon the basis of its prior decisions and upon what it regards as controlling Supreme Court decisions, to reaffirm its order directing respondents to bargain." And later in their brief they said: "In the light of this well-settled doctrine, the Board has, as we have noted, authorized us to advise this Court that if the case were to be remanded to the Board, the Board would adhere to its previous order." And again they said: "Since the Board upon a remand of the case

would adhere to its prior order, it follows that no good purpose would be served by remanding the case to the Board." Thus, the Board declines our suggestion, and we are limited to the record as originally made, of events which occurred in the spring of 1946.

Our disposition of the case was upon consideration of the following features, not merely one of them alone but the composite. The incidents from which the controversy arose occurred two years before the Board brought its petition to this court. There was no later evidence. The dispute itself, even if established to exist as alleged, was utterly minor, about as significant as a street-corner brawl. There was no evidence of antagonism or obduracy on the part of the employers. At most, theirs was a state of confusion, which they sought to resolve by resort to counsel. There was no evidence of the slightest helpful response from any Board representative. The two alleged unfair labor practices were shown only by slight fractions of evidence, taken out of setting. The selectivity displayed by the finder of the facts was startling. The conclusions which the Board reached were confused and inconclusive in critical parts. The trial examiner, and later the Board by adoption, concluded that "The record contains no support for the allegation in the complaint that the respondents have 'urged, persuaded and warned' their employees to refrain from joining the Union." But at the same time it concluded that "respondents interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act [collective bargaining]." That bellboys and maids in very small hotels are in the main a floating sort of labor is well enough known. Upon the rehearing we were advised that only one of the

employees at the hotel in 1946 is still there. In sum, this was a very insignificant, very doubtful, and very old case on the Board's docket. Under that combination of circumstances, we were of the view that a judicial decree of enforcement would not be appropriate, but intimated, and later suggested, that some sort of information less than two years old might be pertinent to further consideration.

The important question in the case concerns the function of the court under the statute which controls us. Does the court have a modicum of judicial discretion in passing upon the petition for an enforcement decree? Or is it required to put the stamp of its authority automatically upon whatever request is made of it? The statute which governs the procedure[2] provides that the Board may petition the court and, if a petition be filed, shall file with the court the entire record of the proceedings. Then the statute provides:

"Upon such filing, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

Thus, the Board is a petitioner in the court. The court has jurisdiction of the question in the case. The decree, when entered, is a judicial order. Violation of it is contempt of court. This procedure is not provided in all statutes. More often, an appeal is provided, and the

[2]Sec. 10(e) of National Labor Relations Act as amended, 61 Stat. 147 (1947) 29 U. S. C. A. §160(e).

administrative order, even when affirmed, remains an executive action.[3] The interposition of the judiciary as the enforcing agency must have some meaning. In Labor Board v. Crompton Mills,[4] the Supreme Court indicated quite definitely that the issuance of a decree and, if issued, its scope and terms are, to some extent at least, matters for consideration by the court. To the same effect are expressions in Labor Board v. Express Pub. Co.[5] Chief Judge Parker, writing for the Circuit Court of Appeals for the Fourth Circuit, discussed the problem in National Labor Rel. Bd. v. Norfolk Shipbuild. & D. Corp.[6] and summarized the answer by the expression "appropriate for present enforcement." With the views which he expressed, we agree. This was the rationale of Franks Bros. Co. v. Labor Board[7] and similar cases. While the original records in those cases were not recent, the petitions for enforcement decrees were upon fresh determinations by the Board that enforcement was presently appropriate.

Substantial considerations support the view that the court should require some reasonably recent indication that a decree is warranted. The function imposed by the Congress upon the courts by this statute is a major one. The Board was not given enforcement power; that power was lodged in the courts as a judicial function. Its exercise is not merely mechanical. The courts cannot, of course, refuse to issue enforcement decrees where the Board has found facts and reached conclusions which indicate that, in accordance with its judgment, enforcement is presently

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[3]The provisions of many statutes are collected and discussed in *Cyclopedia of Federal Procedure* §§7333-7369 (2d ed. 1944).

[4]337 U. S. 217 (1949).

[5]312 U. S. 426, 436-437, 85 L. Ed. 930, 61 S. Ct. 693 (1941).

[6]172 F. 2d 813 (1949).

[7]321 U. S. 702, 88 L. Ed. 1020, 64 S. Ct. 817 (1944).

appropriate. But surely enforcement must appear to be presently desirable before the solemn power of the courts is brought to bear upon the dispute. Idle, pointless court decrees are not helpful to enforcement of the law, but may be actually harmful. Law enforcement is an art; it is not the mere unthinking application of mathematical absolutes. Moreover, entry of decrees unrelated to present reality is not countenanced by our jurisprudence. In an ordinary law suit of the magnitude of the case at bar, we venture to say that no court would enter a mandatory or injunctive decree on data two years old.

Particularly, we do not think that this statute contemplates that the Board can pass on to the courts the problem of enforcement in extremely minor matters, without some showing of a reasonably recent necessity. The federal judiciary has had sad experience with a practice which put upon it the problems of magistrate courts.

Ordinarily these minor disputes are soluble by reasonable conciliatory efforts. No evidence of any such attempts on the part of the Board's representatives appears in this record. There were the one call by the field examiner, the formal notices and letters, the adversary proceeding in most formal fashion, and no more. Clearly, this minor controversy was inserted in some administrative procedural slot and, solely by reflection of the importance of the processes through which it was put, was magnified to noticeable size. The inflexibility of the Board's consideration is well illustrated by what it tells us, in its brief, concerning an election, which was suggested by these respondents. The Board says:

"A well-conducted election calls for expert and experienced judgment in providing procedures and safeguards in such essential matters as (1) unsuggestive

statement of the issue; (2) preparation of eligibility lists; (3) identification of voters; (4) time limits upon and methods for challenges to the eligibility of voters; the marking of a ballot, or the phase of an election; (5) tally of ballots; (6) impounding of disputed ballots; (7) opportunity to place observers; (8) announcement and certification of results; and (9) methods for resolving disputes which inevitably arise in connection with an election."

All this necessary formality is explained to us when the question at issue is the choice of a union by six out of ten bellboys and housemaids in a very small hotel.

We held, and we hold, on the basis of the whole record before us, that an enforcement decree ought not to be entered in this case in the absence of any showing whatever, based on reasonably recent inquiry, that a decree of court is appropriate or necessary.

In our first opinion, we made reference to the findings of the Board but found it unnecessary to examine the substance of the evidence supporting them. The statute governing this proceeding[8] provides: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." It is established that substantial evidence is evidence upon which a reasonable man would act in his own affairs. Upon this record as a whole, there is no such evidence supporting the findings of unfair labor practices or refusal to bargain. We have discussed the

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[8] *Supra* note 1.

matter of the poll. The affair of the housekeeper and the bellboy was even less substantial. On the witness stand the housekeeper said that she and the bellboy were "kidding," and she did not testify to any threat. The Board's counsel, who presented her as a witness, pleaded surprise and produced an affidavit which had previously been secured from the witness. When he offered it and opposing counsel objected, the trial examiner said, "I don't see what the whole thing amounts to anyway." Forthwith the discussion on the item was dropped. Nevertheless, in the final finding, one of the two unfair labor practices charged to the employers was one sentence taken from that affidavit. In its context and in the setting of the testimony, the remark, even if made, was a casual and inconsequential exchange of banter between the lady and a teasing bellboy. The trial examiner's remark at the time seems to be an accurate evaluation.

As to the failure or refusal to bargain, it is true that the attorney for the Union testified on direct examination that he received no answers to his letters to the owners and that "I received no affirmative answer to my request for a meeting for collective bargaining." But on cross-examination he testified that the owner referred him to counsel, that he talked to counsel several times, that they rehashed the matter of the cross-check, and that counsel contended that so far as the company knew the Union did not represent the employees. There was no evidence that any representative of the Board took any steps whatever to assure or reassure the employers, beyond the mailing of the formal Report on Cross-Check. This perplexity of the employers is translated by the Board into refusal and defiance. That the employers had a right to test the validity

of the selection of one purporting to be the bargaining representative of the employees is established.[9] That test came upon the hearing of the complaint. There is no evidence whatever in this record as to the employers' attitude or action after the order of the Board was issued. An employer cannot test that selection if his protest is to be treated as an unfair labor practice and his action after the announcement of the result is treated as immaterial.

What this court has done, and does, in this case is to say to the Board: In so insignificant a controversy, upon events which occurred so long ago, upon such shadowy evidence, ascertain by some reasonably adequate and certain inquiry whether these employers are refusing to bargain with the duly designated representative of their employees and whether their practices do in reasonable reality require a decree of court.

We have not said, and do not say, that if these employers refuse to bargain with the duly designated representative of their employees, even if the unit is only ten people, we will not issue an enforcement decree. We do say that if the Board insists upon court decrees in matters of this insignificant character, it must present reasonably recent and accurate information upon which the court may act.

The opinion, order and decree of this court of September 27, 1948, which were vacated March 1, 1949, for the purposes of the rehearing are hereby reinstated and, as supplemented by this opinion, are made the opinion, order and decree of the court.

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[9] *Norris, Inc., v. N. L. R. B.*, U. S. App. D. C., May 27, 1949.

STEPHENS, *Chief Judge,* dissenting: I think the order of the Board must be enforced. In my view, there is substantial evidence to support the finding of the Board that the respondents' housekeeper—supervisor of maid service—threatened discharge of employees, to wit, maids, if they joined a union. It is true that in one part of the housekeeper's testimony she said that she did not make such a threat. But immediately afterwards, when shown an affidavit the signature upon which she identified as her own, she testified that a statement therein that she had told a bellboy that if the maids joined a union she would "fire" them was true. The Board's trial examiner found that this was not a mere isolated statement, but that it reflected the attitude of the management of the hotel—this because the hotel manager had stated to representatives of the union who called upon him to request that he bargain collectively with them: "Well, if they [the employees] belong to the Union, why are they working here?" The testimony as to this statement was uncontradicted. The Board adopted the trial examiner's finding. The conflict within the testimony of the housekeeper was for the Board to resolve as a trial tribunal. Labor Board v. Link-Belt Co., 311 U. S. 584 (1941).

I think there is substantial evidence to support the finding of the Board that the respondents' manager took a poll of the employees to determine whether or not they desired to be represented by the union. At several points in the course of the hearing before the trial examiner, the manager testified that he had taken a vote or questioned the employees as to whether they wanted the union or not. At one point he testified that: "After hearing from the union I questioned each employee as to whether

they wanted the union or not, and I am of the impression that they do not want a union." It is true that on direct examination by counsel for the respondents, the manager testified that in connection with the arrangements for a cross-check he was given the impression by representatives of the Board that he was himself entitled to take a vote of the employees.[1] But on cross-examination by counsel for the Board, the manager, when asked whether a representative of the Board had said anything to him before he signed the cross-check agreement about an election held by secret ballot as one of the means used by the Board to determine bargaining agents, said that he did not remember that the representative had made any such statement and that the representative gave him no other choice than the cross-check. Moreover, the cross-check agreement, signed by the manager, was introduced in evidence and it shows upon its face that the "cross-check of appropriate Union and Employer records shall be made under the direction and supervision of the Regional Director . . ." Thus again there is a conflict in the evidence which it was for the Board to resolve as a trial tribunal.

I think there is substantial evidence to support the finding of the Board that the union had been chosen as collective bargaining agent by a majority of the respondents' employees in the appropriate unit. Authorization cards authenticated by the uncontradicted testimony of a business agent of the union were received in evidence. They

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[1]A cross-check is a procedure carried out by the Board under an agreement between a union and an employer for the purpose of ascertaining whether or not signature cards, offered by the union as evidencing a majority vote of employees selecting it as a bargaining agent, are in truth cards executed by *bona fide* employees of the industrial unit in question.

show that a majority of the respondents' employees in the appropriate unit (including maids, bellboys and houseman) designated the union as their representative for collective bargaining. The correctness of the finding of the Board that the respondents refused to bargain collectively with the union is not in dispute.

It is not in dispute that threatening discharge of employees if they join a union, conducting a poll to determine whether or not employees desire to be represented by a union, and refusing to bargain with a duly selected collective bargaining representative are unfair labor practices on the part of an employer.

The foregoing reflects the view which I more briefly expressed in my separate opinion on the original decision of this case. I nevertheless then thought that in view of the two-year lapse of time between the selection of the union as the collective bargaining representative of the employees and the enforcement proceeding, and in view of the likelihood of change of employee personnel during that time, the court should decline to enforce the order of the Board until shown by the Board that the conditions found to have existed as the basis for its order continued to exist. But a petition for rehearing was granted after the original decision of the case, and after hearing the argument and considering the authorities presented at the rehearing, I have concluded that my view—expressed in my separate opinion on the original decision of the case —that the order of the Board should not be enforced on the present record, was in error. In Franks Bros. Co. v. Labor Board, 321 U. S. 702 (1944), wherein it appeared that a union, subsequent to a wrongful refusal to bargain,

had lost its majority among the employees, the Supreme Court held that the Board's order to bargain must nevertheless be enforced. The Court said:

". . . One of the chief responsibilities of the Board is to direct such action as will dissipate the unwholesome effects of violations of the Act. See 29 U. S. C. §160(a) and (c). And, "It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." International Association of Machinists v. Labor Board, 311 U. S. 72, 82.

That determination the Board has made in this case and in similar cases by adopting a form of remedy which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. . . .

Contrary to petitioner's [Franks Bros.] suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See Great Southern

Trucking Co. v. Labor Board, 139 F. 2d 984, 987. But, as the remedy here in question recognizes, *a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.* See Labor Board v. Appalachian Power Co., 140 F. 2d 217, 220-222; Labor Board v. Botany Worsted Mills, 133 F. 2d 876, 881-882. *After such a reasonable period* the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships. Id., see 29 U. S. C. §159 (c). [Italics supplied] [321 U. S. at 704-706]

Since in the instant case it is not in dispute that the respondents refused to bargain with the union, and not contended by the respondents that they have complied with the order of the Board since its issuance, but contended only that the order was improper and invalid, the Franks Bros. case is, in my view, clearly controlling upon this court. Other decisions to similar effect are: National Labor Relations Board v. The Andrew Jergens Company, No. 12,051, decided May 17, 1949 (C. C. A. 9th); National Labor Relations Board v. Todd Co., 173 F. (2d) 705 (C. C. A. 2d 1949); National Labor Relations Board v. Arnolt Motor Co., 173 F. (2d) 597 (C. C. A. 7th 1949); National Labor Relations Board v. Norfolk Shipbuild. & D. Corp., 172 F. (2d) 813 (C. C. A. 4th, 1949).

It is to be noted, moreover, that in view of 29 U. S. C. §160(f) (1946), the respondents could have sought prompt judicial review of the Board's order had they seen fit to do so. See National Labor Relations Board v.

Todd Co., supra. Therein the Court of Appeals for the Second Circuit said:

. . . The Company contends that enforcement of the Board's order should be denied because the Board waited from October 4, 1946 until January 23, 1948, to seek enforcement through a court order. We cannot agree. The company could have sought prompt judicial review of that order, under 29 U. S. C. A. §160(b). Not having done so, and having failed to comply with that order, it is in no position to complain of any change of circumstances during the period of non-compliance.[2] [173 F. (2d) at 708]

It may well be that, as suggested by my brethren, this case could have been dealt with more effectively by the Board through conciliation than through an adversary proceeding, i. e., through a complaint charging unfair labor practices. But this, I think, is a matter of administrative policy and not one for judicial direction. Moreover, the fact that the industrial unit is small is, in my view, not a proper basis for refusing to enforce the order of the Board. Employees in a small industrial unit may be even more in need, in order that they may enjoy the rights of free choice of representatives for collective bargaining guaranteed by the National Labor Relations Act, of the protective action of the Board through an unfair labor practice proceeding than employees who, in a large unit, because of their strength of numbers and lesser proximity with supervisors, are less susceptible to interference with these rights. In any event, the rules for

[2]The reference to Section 160(b) of the statute is in error. The correct reference is Section 160(f).

review and enforcement of the Board's orders are the same whether the case be of "minor" or "major" character.

I think the case cannot properly be disposed of adversely to the Board upon the ground that commerce as defined in the Act is not affected as required by the Act for jurisdictional purposes. Under 29 U. S. C. §152(6) (1946), commerce, so far as relevant to this case, means "trade . . . within the District of Columbia . . ."; and under Section 152(7) the term "affecting commerce" is defined to mean those acts which burden the free flow of commerce, and those acts which tend to lead to labor disputes which burden the free flow of commerce. It was stipulated before the trial examiner that during the calendar year 1945 the respondents' gross income exceeded $75,000, and that their purchases exceeded $25,000. The trial examiner so found and the Board adopted the finding. In view of this record I think it must be said that commerce within the District of Columbia is involved. And the finding of the trial examiner, adopted by the Board, that the activities of respondents "have a close, intimate, and substantial relation to trade, traffic and commerce within the District of Columbia, and tend to lead to labor disputes burdening and obstructing such commerce and the free flow of commerce," has not been contested at any stage of the case.

It is true that the Board held in the White Sulphur Springs Company case, No. 9-RC-392 (1949), that a cessation of seemingly substantial expenditures and activities in interstate commerce would have such a remote and indirect effect upon such commerce that to assert juris-

diction would not effectuate the policies of the Act. But it does not follow that the Board would rule that the cessation of such expenditures and activities in local commerce would have such a remote and indirect effect upon that commerce that to assert jurisdiction would not effectuate the policies of the Act in a situation where the Board has authority to deal with acts in and affecting local commerce, as in the District of Columbia and the Territories. The statement of the Board in the White Sulphur Springs Company case that it has been its administrative policy adhered to since 1935 not to assert jurisdiction over the hotel industry overlooks the exercise of jurisdiction by the Board in the instant case. Moreover, I think the Board cannot properly, under the Act, have a general policy which would forbid the exercise of its jurisdiction in a particular case where, as in the instant case, commerce is involved and where, as found in the instant case, the activities of the employer have a substantial relation to commerce and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.